

2410.01 Freedom of Information Act (FOIA)

Issued: January 1, 1994
Revised: May 5, 2012

PURPOSE

To ensure consistent application of the requirements of the FOIA.

APPLICATION

Executive Branch Departments and Sub-units.

CONTACT AGENCY

Respective agency's designated FOIA Coordinator(s) and/or the
Department of Attorney General (AG)
State Operations Division

Telephone: 517-373-1162 (AG)

Fax: 517-373-2060

SUMMARY

The Freedom of Information Act, MCL 15.231 et seq. ("FOIA") provides for public access to records of a public body.

With few exceptions, any public record is available for reviewing or copying by any person who requests the document with sufficient specificity that the document can be identified.

In general, all requests for documents must be responded to within 5 business days after the date the request is received. A 10 business day extension may be obtained by sending an extension letter giving the reason for the extension and the date by which a response will be provided (see Sample Letter 1).

Failure to respond to a FOIA request constitutes a denial. Denials give the requestor the right to appeal to the head of the public body or commence an action in the circuit court to compel the disclosure of the public record.

APPLICABLE FORMS

Vary with the department; but if used, must fully comply with FOIA's provisions.

PROCEDURES

Requestor

- May request public records.
- Must describe the public record sufficiently to enable the receiving public body to find the requested record.
- Has a right to inspect, copy, or receive copies of public records.

- Has a right to subscribe to future issuances of public records which are created, issued or disseminated on a regular basis. Subscriptions are valid for up to 6 months and may be reviewed.
 - If denied access to a public record, may begin an action in the circuit court in the county in which the complainant resides or has his or her principal place of business, or the circuit court for the county in which the public record or an office of the public body is located, to compel disclosure of the public record.
 - If fully successful, shall be awarded reasonable attorney's fees, costs and disbursements, which shall be assessed against the public body that issued the denial.
 - If partially successful, may be awarded all, some or none of the requester's reasonable attorney's fees, costs and disbursements.
 - If the court finds that the public body has arbitrarily and capriciously violated the Act by refusal or delaying in disclosing or providing copies of a public record, shall be awarded punitive damages in the amount of \$500, which shall be assessed against the public body that kept or maintained the public record as part of its public function.

Public Body

- Must designate in writing a FOIA Coordinator who shall be responsible for accepting and processing requests for public records and approving denials of requests for public records.
- Must respond to FOIA requests within 5 business days after the date of receipt of the request. Written requests made by facsimile, electronic mail or other electronic transmission are not received by a public body's FOIA Coordinator until 1 business day after the electronic transmission is made.
 - May issue a notice extending the date for response for not more than 15 business days after the date of receipt of the request (10-day extension). An extension may only be taken one time per request. The notice must contain the reasons for the extension and the date by which the response will be provided (see Sample Letter 1).
 - A response means:
 - Granting the request in writing (see Sample Letters 2 and 3);
 - A written notice denying the request (see Sample Letter 4); or
 - A written notice granting the request in part and denying the request in part (see Sample Letter 5).
 - A written notice extending the response time after which a grant or denial determination is made in a written notice (see extension paragraph above).
- Failure to respond within the statutory deadlines constitutes a denial.

- In responding to a request, the FOIA Coordinator shall do the following:
 - Determine if the record is exempt.
 - If yes, process the denial, identifying and explaining the applicable exemptions.
 - If no, determine if the document is readily available.
 - If yes, make copies and process the FOIA response, granting the request (see Sample Letters 2 and 3).
 - If no, provide time to obtain the responsive documents, send a 10 day extension letter, specifying the reasons for the extension and the date when the public body will respond.
- Must provide a certified copy of a public record, if the requestor asks for such certification. Generally, certification includes a statement that, to the best of the public body's knowledge, information and belief, the document is a true copy of the primary record.
- Must furnish the requestor with:
 - A reasonable opportunity to inspect and examine its public records.
 - Reasonable facilities for making memoranda or abstracts from its public records during usual business hours.
- May make reasonable rules necessary to protect its records and prevent excessive and unreasonable interference with the discharge of its functions.
- Except as discussed below:
 - Is not required to compile, summarize or report information.
 - Is not required to create a new public record.
 - Is not required to produce edited copies of an already existing public record.
- Must use the most economical means available to provide copies of public records.
- Must separate exempt from non-exempt material and make the non-exempt material available.
 - When designing a public record, the public body, to the extent practicable, is to facilitate the separation of exempt and non-exempt materials.
 - If the separation is readily apparent to a requestor, the public body is to generally describe the exempted material, unless that description would reveal the contents of the exempt information and defeat the purpose of the exemption.
- Must establish and publish procedures and guidelines to implement Section 4 of the FOIA concerning the charging of fees.

Fees

- Public Body may charge a fee for providing a copy of a public record.
- Except as may be provided in another Act, the fee can be no more than the:
 - Actual mailing costs; and
 - Actual incremental cost of duplication or publication, including labor, calculated using the hourly wage of the lowest paid, full-time, permanent clerical employee; and
 - Cost of search, examination, review, deletion and separation of exempt from non-exempt information, calculated using the hourly wage of the lowest paid, full-time, permanent employee capable of performing these necessary tasks.
 - Fees are not to be charged for the cost of examination, review, deletion and separation of exempt from non-exempt information, unless failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particular instance, and the public body identifies the nature of the unreasonably high costs.
 - Fees may be waived or reduced if the public body determines that a waiver or reduction is in the public interest because searching for or furnishing copies of the public record can be considered as primarily benefitting the general public.
 - If a requestor files an affidavit stating that he/she is a recipient of public assistance, or stating facts showing an inability to pay the cost due to indigency, the public body must waive the first \$20 of the fee for each request.
 - A good faith deposit from the requestor, of not more than ½ of the total expected fee may be requested by the public body if the anticipated amount of the fee exceeds \$50.
- Fees set under an act or statute specifically authorizing the sale of those records to the public or if the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute supersede fee provisions under the FOIA.
- Must publish and make available to the public the following:
 - Final orders or decisions in contested cases, and the records on which they were made.
 - Promulgated rules.
 - Other written statements which implement or interpret laws, rules or policy, including but not limited to guidelines, manuals, and forms with instructions, adopted or used by the agency in the discharge of its functions.
 - Publications may be in pamphlet, loose-leaf or other appropriate form in printed, mimeographed or other written matter.

If the Request is Denied

- The written notice of denial constitutes a final determination by the public body.
- The written notice must contain (see Sample Letters 4 and 5):
 - An explanation of the basis for the determination that the public record or a portion of the public record is exempt from disclosure if that is the reason for denying the request.
 - A certificate that the public record does not exist under the name given by the requestor, or by another name reasonably known to the public body if that is the reason for denying the request.
 - A description of the public record, or information on a public record which is separated or deleted, if a separation or deletion is made.
 - A full explanation of the requestor's right to do either of the following:
 - Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the disclosure denial;
 - Seek judicial review under Section 10 of the FOIA;
 - Notice of the right to receive attorneys' fees and damages provided in Section 10 if, after judicial review, the circuit court determines that the public body has not complied with Section 5 and orders disclosure of all or a portion of a public record.
 - The signature of the FOIA Coordinator.

Exemptions

- The following public records may (and where applicable, shall) be exempt from disclosure under the FOIA; however, this may not constitute an exhaustive list of all exemptions:
 - Information of a personal nature, where public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.
 - Investigating records compiled for law enforcement purposes, but only to the extent that disclosure would do any of the following:
 - Interfere with law enforcement proceedings.
 - Deprive a person of the right to a fair trial or impartial administrative adjudication.
 - Constitute an unwarranted invasion of personal privacy.
 - Disclose the identity of a confidential source or, if the record is compiled by a criminal law enforcement agency in the course of a criminal investigation, disclose confidential information furnished only by a confidential source.

- Disclose law enforcement investigative techniques or procedures.
 - Endanger the life or physical safety of law enforcement personnel.
- A public record which, if disclosed, would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure outweighs the public interest in non-disclosure.
- Records or information specifically described and exempted from disclosure by statute.
- Information, the release of which would prevent the public body from complying with 20 U.S.C. § 1232g. (This section deals with access to education records maintained by an educational agency or institution that received federal funds.)
- A public record or information which is furnished by the public body originally compiling, preparing or receiving the record or information to a public officer or public body, in connection with the performance of the duties of the public officer or public body, if the considerations originally giving rise to the exempt nature of the public record remain applicable.
- Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:
 - The information is submitted upon a promise of confidentiality by the public body.
 - The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.
 - A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person on request.
 - This exemption does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license or other benefit.
 - Information or records subject to attorney-client privilege.
 - Information or records subject to the physician-patient, psychologist-patient, minister, priest or Christian Science practitioner, or other privilege recognized by statute or court rule, such as attorney work product.
 - A bid or proposal by a person to enter into a contract or agreement, until the time for the public opening of bids or proposals has expired.

- Appraisals of real property to be acquired by the public body, until:
 - An agreement is entered into; or
 - Three years have elapsed since the making of the appraisal, unless litigation relative to the acquisition has not yet terminated.
- Test questions and answers, scoring keys and other examination or data used to administer a license, public employment or academic examination, unless the public interest in disclosure outweighs the public interest in non-disclosure.
- Medical, counseling, or psychological facts or evaluations concerning an individual, if the individual's identity would be revealed by disclosure of those facts or evaluations, including protected health information.
- Communications and notes within a public body, or between public bodies, of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action.
 - This exemption does not apply unless the public body shows that in that particular instance, the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure.
 - This exemption does not constitute an exemption under state law, or for purposes of § 8(h) of the Open Meetings Act, MCL 15.268(h).
- Records of law enforcement communication codes, or plans for deployment of law enforcement personnel which, if disclosed, would prejudice a public body's ability to protect the public safety, unless the public interest in disclosure outweighs the public interest in non-disclosure in the particular instance.
- Information which would reveal the exact location of archeological sites.
 - The Michigan State Housing Development Authority (MSHDA) may promulgate rules to provide for disclosure of the location of archeological sites for purposes relating to preservation or scientific examination of sites.
- Testing data developed by a public body in determining whether a bidder's products meet the specifications for purchase of those products by the public body, if disclosure of the data would reveal that only 1 bidder has met the specifications.
 - This section does not apply if more than 1 year has passed from the time the public body has completed the testing.

- Records of a campaign committee including a committee that receives money from a state campaign fund.
- Unless the public interest in disclosure outweighs the public interest in non-disclosure, law enforcement agency records, if the release would do any of the following:
 - Identify or provide a means of identifying an informer.
 - Identify or provide a means of identifying a law enforcement undercover officer, or an agent or a plain clothes officer, as a law enforcement officer or agent.
 - Disclose the name, address or telephone number of family members, relatives, children or parents of active or retired law enforcement officers or agents.
 - Disclose the personal address or telephone number of active or retired law enforcement officers or agents or a special skill they may have.
 - Disclose operational instructions for law enforcement officers or agents.
 - Reveal the contents of staff manuals provided for law enforcement officers or agents.
 - Endanger the life or safety of law enforcement officers or agents or their families, relatives, children, parents or those who furnish information to law enforcement departments or agencies.
 - Identify, or provide a means of identifying, a person as a law enforcement officer, agent or informant.
 - Disclose personnel records of law enforcement agencies.
 - Identify, or provide a means of identifying, residences that law enforcement agencies are requested to check in the absence of their owners or tenants.
- Except as otherwise provided, records and information pertaining to an investigation or a compliance conference conducted by the department under article 15 of the Public Health Code, before a complaint is issued.
- Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys and security procedures, to the extent that the records relate to the on-going security of the public body.
- Records or information relating to a civil action in which the requesting party and the public body are parties.
- Information or records that would disclose the social security number of an individual.

- Records or information of measures designated to protect the security or safety of persons or property, whether public or private, including, but not limited to, building, public works, and public water supply designs to the extent that those designs relate to the ongoing security measures of a public body, capabilities and plans for responding to a violation of the Michigan Anti-terrorism Act, emergency response plans, risk planning documents, threat assessments, and domestic preparedness strategies, unless disclosure would not impair a public body's ability to protect the security or safety of persons or property unless the public interest in disclosure outweighs the public interest in non-disclosure in the particular instance.

Other Information/Thoughts/Suggestions

- Develop a method of tracking FOIA requests and responses to assure compliance with the time frames set forth in the FOIA to assure that all persons involved in the process know which items have been released in the past, as well as:
 - A method for determining the circumstances under which denials were made.
 - The circumstances in which exempt material has been redacted from non-exempt material.
 - The result of appeals.
- Requestors who inspect documents on-site should:
 - Be provided a designated space.
 - Review documents in the presence of a staff member.
 - Not be allowed to remove documents from files or from the premises unless those documents are copied specifically for the requestor by staff of the affected public body.
- Make sure that fees are paid prior to releasing the requested documents.
- If the requestor seeks a certified copy of a document, the designated official should place: "To the best of my knowledge, information and belief, I certify that this is a true copy of the primary record." on the face of the document, and sign his or her name below the statement.
- Some departments (e.g., Corrections) have special additional authority concerning requests for information. If your agency falls within this category, refer to specific procedures for your agency.

SAMPLE LETTER 1

EXTENSION OF TIME IN WHICH TO RESPOND TO FOIA REQUEST

[Date]

[Name/Address of Requestor]

Dear [XXX]:

This notice is issued in response to your _____[date] request received by the Department of _____[Dept. name] on _____[date] for records and information under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*

In order to determine the extent of responsive information, inquiry must be made within this office and relevant files must be searched. Therefore, it is necessary to extend the time for response as permitted by MCL 15.235(2)(d). A response will be mailed to you on or before _____[date].

[closing]

[signature and title of responding official]

SAMPLE LETTER 2
RESPONSE GRANTING FOIA REQUEST – NO FEES

[Date]

[Name/Address of Requestor]

Dear [XXX]:

This notice is in response to your letter dated _____[date] received by the Department of _____[Dept. name] on _____[date] requesting records and information under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*

Your request is granted.

To the best of the Department's knowledge, information and belief, the enclosed copies are all of the records in the possession of the Department responsive to your request. There is no fee for the request, for the reason that the search and retrieval was minimal, and it involves a number of pages below the Department's threshold for copying costs.

[closing]

[signature and title of responding official]

SAMPLE LETTER 3

RESPONSE GRANTING FOIA REQUEST – DEPOSIT

[Date]

[Name/Address of Requestor]

Dear [XXX]:

This notice is in response to your letter dated _____[date] received by the Department of _____[Dept. name] on _____[date] requesting records and information under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*

Your request is granted as to non-exempt records within the Department's possession that are responsive to your request. The anticipated cost of providing the information is \$_____ [total cost] calculated as follows:

_____ hours of labor at \$_____ per hour, which is based on the rate of the lowest paid Department employee capable of searching for, retrieving, examining and reviewing records responsive to your request. Total = \$_____.

Photocopying of approximately _____ pages at \$_____ per page. Total = \$_____.

Mailing costs. Total = \$_____.

Failure to charge for the above-stated labor would result in unreasonably high costs to the Department because

[list reasons(s)]_____ per MCL 15.234(3).

MCL 15.234(2) provides that a public body may require a deposit of one-half of the estimated FOIA processing fee. Upon receipt of a deposit check for \$_____, (one-half of the total estimated amount) made payable to the State of Michigan and sent to the FOIA Coordinator, Department of _____[Dept. name], _____[address], the Department will complete the processing of your request.

You will be notified of the balance due, along with the statutory basis for any exemptions and your statutory remedial rights, if applicable. Copies of the non-exempt records will be mailed to you upon receive of the balance.

[closing]

[signature and title of responding official]

SAMPLE LETTER 4
DENIAL OF FOIA REQUEST

[Date]

[Name/Address of Requestor]

Dear [XXX]:

This notice is in response to your letter dated _____[date] received by the Department of _____[Dept. name] on _____[date] requesting records and information under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*

Your request is denied.

Option 1 – After a search for records responsive to your request, to the best of the Department’s knowledge, information and belief, the Department does not possess records under the description given in your request or by other names reasonably known to the Department.

[OR]

Option 2 – The information you seek is exempt from public disclosure under MCL_____ [insert section].

[list each exempt record and specify and explain in detail how the exemptions apply in this case]

[give explanation and cite the applicable exemption]

[include the following language:]

Pursuant to MCL 15.240, because your request was denied, the Department is obligated to inform you that you may do one of the following:

1. Appeal this decision in writing to the Department of _____[Dept. name]. The writing must specifically state the word “appeal” and must identify the reason or reasons for reversal of the denial. The head of the Department, or his/her designee, must respond to your appeal within 10 days of its receipt. Under unusual circumstances, the time for response to your appeal may be extended by 10 business days.
2. File an action in circuit court to compel the Department’s disclosure of the public records within 180 days after the Department’s final determination to deny the request. If the circuit court, after judicial review, determines that the Department has not complied with MCL 15.235 and orders disclosure of all or a portion of a public record, the court shall award reasonable attorneys’ fees, cost and disbursements. Further, if the circuit court determines that the Department has

arbitrarily and capriciously violated the FOIA by refusal or delay in disclosing or providing copies of a public record, the court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of \$500.00.

[closing]

[signature and title of responding official]

SAMPLE LETTER 5

GRANT FOIA REQUEST IN PART / DENY FOIA REQUEST IN PART

[Date]

[Name/Address of Requestor]

Dear [XXX]:

This notice is in response to your letter dated _____[date] received by the Department of _____[Dept. name] on _____[date] requesting records and information under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*

Your request is granted in part and denied in part.

To the best of the Department's knowledge, information and belief, the enclosed copies are all of the records responsive to your request in the possession of the Department. There is no fee for the request, for the reason that the search and retrieval was minimal, and involves a limited number of pages below the Department's threshold for copying costs.

In addition, we identified the following records which are exempt from disclosure either in whole or in part:

[list each exempt record]

[state whether it is being denied entirely – and thus is not enclosed with letter, or is being denied in part – and that those non-exempt portions are enclosed with letter]

[give an explanation and cite the applicable exemption]

[include the following language:]

As to the denial of your request, pursuant to MCL 15.240, the Department is obligated to inform you that you may do one of the following:

1. Appeal this decision in writing do the Department of _____[Dept. name]. The writing must specifically state the word "appeal" and must identify the reason or reasons for reversal of the denial. The head of the Department, or his/her designee, must respond to your appeal within 10 days of its receipt. Under unusual circumstances, the time for response to your appeal may be extended by 10 business days.
2. File an action in circuit court to compel the Department's disclosure of the public records within 180 days after` the Department's final determination to deny the request. If the circuit court, after judicial review, determines that the Department has not complied with MCL 15.235 and orders disclosure of all or a portion of a public record, the court shall award reasonable attorneys' fees, cost and

disbursements. Further, if the circuit court determines that the Department has arbitrarily and capriciously violated the FOIA by refusal or delay in disclosing or providing copies of a public record, the court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of \$500.00.

[closing]

[signature and title of responding official]
